Office Supreme Court, U. S.
FILED.
MAR 29 1895
JAMES H. McKENNEY,
CLERK.

UNITED STATES SUPREME COURT.

WILLIAM W. BRAUER, FREDERICK C. BRAUER and THE RELIANCE MARINE INSURANCE COMPANY (LIMITED),

Libellants,

against

COMPANIA DE NAVIGACION LA FLECHA,

Respondent.

Petition of Respondent for Writ of Certiorari.

BUTLER, STILLMAN & HUBBARD,

Proctors for Petitioner.

United States Circuit Court of Appeals

SECOND JUDICIAL CIRCUIT.

WILLIAM W. BRAUER, FREDERICK C. BRAUER and THE RELIANCE MARINE INSURANCE COMPANY, LIMITED,

Libellants,

AGAINST

COMPANIA DE NAVIGACION LA FLECHA,

Respondent.

Notice is hereby given that upon the petition of the Compania de Navigacion La Flecha, verified the 26th day of March, 1895, and upon all the pleadings and proceedings herein, we shall, on Monday, the 1st day of April, 1895, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, submit a motion, a copy of which is herewith served upon you, to the Supreme Court of the United States at the Capitol in the City of Washington.

New York, March 26th, 1895.

BUTLER, STILLMAN & HUBBARD,
Proctors for Respondent.

TO MACFARLAND & PARKIN,
Proctors for Libellants.

SUPREME COURT OF THE UNITED STATES.

WILLIAM W. BRAUER and FREDERICK C. BRAUER and the RELIANCE MARINE INSURANCE COMPANY, LIMITED,

Libellants,

AGAINST

COMPANIA DE NAVIGACION LA FLECHA,

Respondent.

And now comes Compania de Navigacion la Flecha by Wilhelmus Mynderse, its advocate, and moves this Honorable Court for a writ of *certiorari* directed to the Honorable Judges of the United States Circuit Court of Appeals for the Second Judicial Circuit, commanding them forthwith to certify and return to this Court all of the proceedings by them had in the suit now or lately before them, wherein William W. Brauer, Frederick C. Brauer and the Reliance Marine Insurance Company, Limited, were libellants, and Compania de Navigacion la Flecha was respondent.

WILHELMUS MYNDERSE,
Advocate for Petitioner.

TO THE SUPREME COURT OF THE UNITED STATES:

The petition of Compania de Navigation la Flecha, for a writ of *certiorari* to the Judges of the United States Circuit Court of Appeals for the Second Judicial Circuit, to bring before the Supreme Court a certain case wherein William W. Brauer, Frederick C. Brauer and the Reliance Marine Insurance Company, Limited, are libellants against the Compania de Navigacion la Flecha, respectfully shows:

FIRST. At all the times hereinafter mentioned, the libellants William W. Brauer and Frederick C. Brauer were copartners doing

business under the firm name of William W. Brauer & Co., and the Reliance Marine Insurance Company, Limited, was a corporation organized under the laws of Great Britain.

SECOND. At all the said times the Compania de Navigacion la Flecha was a corporation organized and existing under the laws of the Kingdom of Spain, and owner of the ocean steamer "Hugo."

THIRD. On or about the 10th day of October, 1891, the petitioner, acting by its agent, entered into a contract with the firm of William W. Brauer & Co., for the transportation of about 160 live cattle on the upper deck of the steamer "Hugo" intended to sail from New York about October 24th, 1891, for Liverpool, England. By the terms of the contract it was provided that the shippers should assume all risk of mortality or accident, however caused, throughout the voyage, and that the regular line form of live stock bill of lading should be used for the cattle shipped under the contract, and that its conditions should govern any questions not provided for in the contract.

FOURTH. Thereafter and on the 24th day of October, 1891, the said William W. Brauer & Co. shipped on the "Hugo" 165 live cattle on deck, and a bill of lading was issued therefor by the steamer in which it was provided, among other things, that the animals were on deck at owner's risk, and further that the steamer should not be held accountable for accident to or mortality of the animals from whatever cause arising, and further that the carrier should not be liable for loss or damage occasioned by causes beyond its control by perils of the sea or other waters, by collisions, stranding or other accidents of navigation of whatsoever kind, even when occasioned by the negligence, default or error in judgment of the master, pilot, mariners or other servants of the shipowner, not resulting from want of due diligence by the owners of the ship; and further that the contract should be governed by British law, with reference to which law the contract was stated to be and was in fact made; and, finally, that in respect to the bill of lading the shipper, owner, consignee or holder thereof agreed to be bound by all of its terms and conditions, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee or holder.

FIFTH. On the said 24th day of October, 1891, the said steamer set sail from New York bound to Liverpool, England.

The "Hugo" was an iron steamer of the highest class, and in good condition. Her length was 375 feet, and her beam 36 feet, and her depth of hold about thirty feet. Under the contract the stalls for the cattle were to be erected by the ship to the satisfaction of the shipper, who assumed all responsibility for the same. They were of the usual style, were properly constructed and in every way sufficient. The cattle were in charge of two drovers with four assistants, all in the employ of the shippers.

SIXTH. On the 30th of October the steamer met a storm which continued until November 2d. During the continuance of the storm the steamer lay hove to for thirty-six hours. When the storm was over 126 cattle had been lost. One beast died subsequently, and the remaining thirty-eight were delivered by the steamer at Liverpool about November 7th.

SEVENTH. The firm of William W. Brauer & Co. had taken insurance upon the cattle from the Reliance Marine Insurance Company against perils of the sea, jettisons, barratry of the master and mariners, and all other perils, losses and misfortunes that might come to the hurt, detriment or damage of said cattle, to the extent of $75 per head, the said cattle being valued in said policy at the sum of $100 per head, and on November 30th, 1891, the said insurance company paid to William W. Brauer & Co. insurance on the said 126 head of cattle so lost at sea

EIGHTH. On the 25th day of March, 1892, the members of the firm of William W. Brauer & Co. and the Reliance Marine Insurance Company united in a libel filed in the District Court of the United States for the Southern District of New York against the Compania de Navigacion la Flecha, claiming damages in respect to the loss of said cattle upon allegations that the "Hugo" having encountered some rough weather, her master and crew became panic stricken and drove overboard 126 head of cattle. The libel alleged that the vessel did not incur any extraordinary or unusual stress of weather, and that the act of said master and crew in driving overboard said cattle was wholly unnecessary, and that the loss of the cattle was due to the incompetency and lack of skill of the master and crew. Damages were claimed in the amount of $12,600.

NINTH. On the 8th day of July, 1892, the Compania de Navigacion la Flecha filed its answer to the libel, in which, among other things, it averred that by the terms of the contract of shipment it was provided that the carrier should not be liable for loss or damage occasioned by causes beyond its control, by the perils of the seas or other waters, or by other accidents of navigation, even when occasioned by the negligence, default or error in judgment of the master, mariners or other servants of the ship owner, and that the cattle were carried on deck at the owners' risk and under a special provision that the steamer should not be accountable for accident to or mortality of the animals from whatever cause arising, and that the contract should be construed and governed by the law as administered in the Courts of Great Britain. The answer further averred that the loss of the cattle was due to perils of the sea encountered upon the voyage, which broke certain of the cattle houses and set the cattle adrift, and that during the continuance of the perils and by reason thereof, certain of the cattle were washed overboard and others were thrown about the deck, bruised and with broken limbs, and reduced to a dead, dying or helpless condition, and that upon such being taken to the gangways they were washed overboard by the seas, which were at the time so raging that one of the seamen of the steamer was washed from the deck into the sea. The answer further averred that the care given to the cattle was according to the best judgment of the master of the steamer, and that if he erred in his judgment or was in any degree negligent, which was denied, the ship owner was absolved from liability and responsibility by reason of the terms of the bill of lading, and that by the law as administered in Great Britain, the ship owner being without fault, was validly, under the terms of the contract and bill of lading, absolved from all responsibility for any negligent or improper act or conduct on the part of its master, mariners or other servants.

TENTH. The case came on for trial in the District Court in January, 1893. Upon the trial, proofs were presented by the libellants in an attempt to show that the master was negligent in the navigation of his vessel, and that the loss of the cattle was due to that cause. They also presented proofs to show that the cattle had been driven overboard under the orders of the master of the steamer. The respondent presented proofs to sustain the allega-

tions of its answer. The log of the steamer showed that in the afternoon of October 30th, a heavy sea destroyed some of the cattle hatches on the port side, opposite hatches four and three, and continued:

"We immediately fixed up in the best manner that it was "possible the houses and the oxen; the boards that were lying "loose on the deck we threw overboard. Nightfall, the weather "slightly clear towards the horizon, with signs of heavy rain clouds; "wind fresh from the northwest, seas very lively from the same di- "rection and from the west, coming on board with less force than "during the afternoon, and in this way we passed the night. At "daylight, wind very fresh from the north, with seas from the same "direction and from the northwest.

"On the twentieth hour we stopped the engine in order "to arrange the houses that had been broken during the "night opposite No. 4, and replaced the oxen that were outside of "their houses. At nine o'clock they were all back in their places "with the exception of one which remained on hatch No. 5, and "which, notwithstanding all our endeavors to get him to rise, it has "been impossible to succeed, he remaining on the same hatch No. "5. Subsequently, and while the engine was still stopped, we gave "food and drink to all the oxen. On the twenty-second hour after "all was arranged, we again started under full steam and continued "to sail in the direction of our course, and without further mishaps "we arrived at the middle of the day.

"October 31st (12 o'clock noon). Commencing this day with "very strong wind from the north-northeast with very lively seas "from the same direction and from the northwest, which came on "board from all over, flooding the houses and bridges always full "of water and governing our course as noted in the table. In the "second hour weather very hard from the north-northeast, the "heavens and the horizon closed and with rain accompanied by "very heavy seas with full crest, also from the northwest, which strike "against the sides of the vessel, coming on board and making the "vessel labor terribly. At this hour some of the houses opposite "No. 4 were destroyed; several of the oxen being loose, we stopped "the engine and remained cross-wise to wind and seas; seeing that "the weather was becoming worse at every moment and that the "barometer continued to fall rapidly (at this time, 29.55), we "determined to open gangway No. 4 in order that the oxen which "were loose could go over, which was done with much precaution "to avoid personal mishaps. Once that it was opened, the oxen "that were loose were carried over with the heavy rolling of the "vessel. These were about ten, with the one mentioned on the "previous day which was almost dead and which we threw over "with ropes. Towards nightfall, weather quite a hurricane, the "machinery stopped, and lying crosswise to the wind and waves, the "vessel rolling and making all suffer very much. At twelve hours

" we set the mainsail with the object of steadying the vessel. The " greater part of the oxen are down and many are carried from port " to starboard with the boards from the houses, loose on account of " the heavy rolling of the vessel and with a thick and heavy sea that " comes on board on both sides. In this way, and with the weather " declared into a hurricane, we passed the night.

" At daylight, hurricane. All the deck is in a lamentable state ; " the cattle from port to starboard and from starboard to port, some " with their legs broken, others dead with so much suffering, others " with their legs tangled in the rail ; and some, during the " night by the blows of the seas and the rolling of the ship, " had gone out through the gangway to the water. On the nine- " teenth hour (7 A. M. Sunday) we decided to open gangway " No. 3, which was done with much precaution, as it was im- " possible to go on deck on account of the rollings, and the seas " that continually came in, and we immediately commenced the sad " operation of throwing over all the cattle that were loose on the " decks and in sorry plight, some with ropes and others dragging " them to the gangway and from here the seas that were boarding " us would carry them over. We have noticed the absence of some " of the hatch wedges, very likely knocked out by the cattle during " the night, and have immediately replaced them with new ones. " The hurricane continues with great force and fury, the barometer " 29.21. Notwithstanding our precautions to avoid personal mis- " haps, at 10:30 in the morning, more or less, a sea carried out " through gangway No. 3 one of the boys named Enchortiata. He " was carried over. We noted his absense and immediately, as he had " not become separated from the side of the vessel, we threw him a " life preserver and with the aid of a thin rope we were able to save " him. On coming on deck we noticed he was bleeding from one " ear, no doubt having received a blow on that part. We put him " to bed.

" On the twenty-third hour, the wind carried away the mainsail, " leaving nothing but the bolt ropes of the same. At noontime the " stern was clear, there being no more cattle. There are only some " remains of the houses. Towards the bow the gangway No. 34 is " clear, as is also the hatchway. There remain on board only " thirty-nine oxen and those up by the bow forward of No. 3, " which are the ones that suffered less from the effects of the hur- " ricane.

* * * * * * *

" November 1st (12 o'clock noon). We commenced this day " with the engines stopped and the rigging taut, with hurricane, the " vessel crosswise to wind and seas. Towards afternoon the wind " slackened somewhat in force, but the high and crested seas con- " tinued the same, striking the vessel as in the previous day and " with much rolling. On the fourth hour we put up the staysail to " steady the rolling of the ship. Night came on with the wind very

" hard from the north, accompanied by terrible seas with heavy " crests, which strike against the hull making the vessel shiver. At " eight o'clock the wind commenced to decrease and the seas gradu- " ally to go down."

By stipulation it was provided that the English judicial decisions, as contained in the printed reports of the Law or Admiralty Courts, be referred to as evidence of the English common or maritime law as administered in the English courts *(fol. 678)*, and refereuce was made by the petitioner to the cases of the *Duero, 2 Ad. & Ecc., 393; Grill vs. The General Iron Screw Collier Co., L. R., 1 C. P., 600; The Cressington, L. R., 1 Prob., 152; Burton vs. English, L. R., 12 Q. B. Div., 218.*

ELEVENTH. On the 8th day of July, 1893, the learned District Judge filed his opinion, in which he held that, by the perils encountered, some of the cattle were fatally wounded or maimed, but that others were cast overboard, or negligently suffered to go overboard, without any effort being made to separate the sound from the maimed *(Opinion, fol. 803)*, and he, therefore, held that the libellants were entitled to a decree for such of the oxen voluntarily sacrificed as were either in sound condition or not fatally wounded or maimed at the time they were cast overboard, or negligently or designedly suffered to go overboard through the open gangways on the morning of November 1st, and on the evening of the night previous. He further held that the exemptions of the bill of lading, which provided that the cattle should be at owners' risk, and that the steamer should not be held accountable for accident to or mortality of the animals, or for any accidents of navigation, even when occasioned by the negligence, default or error in judgment of the master, were invalid as against the public policy of this country, and that the further stipulation substituting the British law for the law of the United States was likewise invalid *(Opinion, fols. 806, 807)*; and reference was made to a Commissioner to assess damages accordingly.

TWELFTH. The Commissioner reported:

" I am satisfied that much the greater portion of the 126 cattle " were set loose by the storm and thrown down and rolled about " the deck during Saturday night and Sunday, and that at least half " of all that were lost were either dead or fatally wounded or maimed " and in a hopeless condition when they were carried overboard."

* * * "My conclusion from the whole evidence is in favor of the "probability that the proportions between the dead and the fatally "wounded on the one hand, and those that were alive and not "fatally maimed or wounded on the other, are about equal" (*Report, fols. 936, 937*), and he accordingly reported against the respondent for the loss of 63 cattle.

THIRTEENTH. The District Court modified the report of the Commissioner in the matter of certain attendant expenses, but confirmed his allowance of damages in respect to the number of cattle, and entered a decree against the respondent for $7,104.32.

FOURTEENTH. Appeal was taken by both parties from this decree to the United States Circuit Court of Appeals for the Second Judicial Circuit, where it came on for argument in December, 1894. The same authorities cited by the petitioner in the District Court were presented upon such argument.

A decision was filed March 5, 1894, a majority of the Court holding that the decree of the District Court should be affirmed, stating:

"The reason for throwing both sound and maimed cattle over-"board was a great dissatisfaction with the existing state of the "decks, an apprehension that the state of things would continue, "and a determination to put an end to trouble from cattle."

The opinion recites the provision that the cattle were shipped "on deck at owner's risk," but gives no consideration whatever to that provision or to the case cited to show the construction given by the English courts to such provision.

In considering the provision "Steamer not to be held accountable "for accident to or mortality of the animals from whatsoever cause "arising," the majority of the Court held that the loss of the 63 cattle was not an accident, nor was the destruction to be regarded as mortality.

In considering the clause which provided that the shipowner should not be responsible for damages occasioned by causes beyond his control, by the perils of the sea, by accident of navigation of whatsoever kind, even when occasioned by the negligence or default of the master, mariner, pilot or other servants, the majority of the Court held, without consideration of the provision, that the shipowner should not be liable for loss "occasioned by causes beyond his control;" that the acts of the master and crew in regard to the 63 cattle were not occasioned by an accident of navigation, caused by negligence or error of judg-

ment, but that it was an entire clearance of the decks without apparent necessity, and without an effort to discriminate or save any, and that the act of the master was not the result of an opinion that the drowning of the sound cattle was called for by prudential considerations for the ultimate safety of the lives or the property in his charge. The majority further held that only the injury to, and the drowning of, the maimed animals were caused by perils of the sea, and that the non-delivery of the sound cattle was not caused by a peril of the sea, or by accidents to navigation, or by circumstances properly incident to navigation.

The majority of the Court further held that the master's unfounded but existing apprehension in regard to the future relieved his conduct from the charge of barratry.

The majority of the Court held :

"The respondent offered proof of the British law, as announced "by English decisions, which permits the ship owner to relieve him- "self, by express contract, from the consequences of the negligence "of his captain or crew, but no decision touches with any closeness "the state of facts which are disclosed in this record, and we are "left to decide, without the aid of English authorities, the question "whether the acts of the master which caused the non-delivery of "sixty-three cattle were within the clauses in the bill of lading which "freed the ship owner from liability."

The Court did not in its opinion refer to any English authorities as being authorities examined by them.

Judge WALLACE dissented from the opinion held by the majority of the Court and said :

"I agree with the commissioner when he says, 'I do not doubt the "'entire good faith of the master, and that he would gladly have "'saved the other cattle, as well as the thirty-nine that remained "'on board.' The theory of the libel is that the master and crew "of the vessel became 'panic-stricken,' and drove the cattle over- "board, and the evidence more nearly supports this theory than the "one which has been adopted. I think a prudent regard for the "safety of the ship and crew, in view of the situation as it "was at the time, justified him in clearing the deck of the "mass of dead and wounded cattle, and that it is idle to "say that there was any practicable opportunity upon that "storm-swept deck to separate the dead cattle from the "wounded and dangerous live ones. After the event, and with the "wisdom which comes from retrospect, it is not difficult to conjec- "ture in case of disaster what might have been done that was not

" done, but I am satisfied from the proofs that the master did every-
" thing which a prudent and honest navigator would have done
" under the circumstances from the time he hove to his vessel until
" the hurricane was over, and that the loss of the cattle was caused
" by perils of the sea, and therefore within one of the excepted risks
" of the bill of lading."

FIFTEENTH. Since the decision of the United States Circuit Court of Appeals the petitioner has made a motion for a reargument of the cause in that Court, and his application has been denied without any opinion being filed by the Court.

SIXTEENTH. By the provisions of the English law, which were duly presented to the United States Circuit Court of Appeals, it is held that in the event of shipments being made under bills of lading which provide that they are on deck at owner's risk, the ship owner cannot be held liable for any loss arising through an unjustifiable jettison of the goods by the master, or by reason of any other negligent act of the master or crew (Burton vs. English, L. R., 12 Q. B. Div., 218), and that by other provisions of the English law, which were duly presented to the Court, it is held that the ship owner may lawfully exempt himself from liability or responsibility for damages arising through the negligence of master, pilot, officers or crew.

SEVENTEENTH. Your petitioner avers that this case is one in which it is proper for this Court to issue a writ of *certiorari* for the following reasons:

(1) Because the said cattle were lost by perils of the sea.

(2) It being admitted that one-half the cattle were maimed or killed by perils of the sea, and that it was proper for the master to clear his decks of such cattle, it should be held that the remaining cattle could not, even if living, be separated from those that were wounded or dead, and that they were lost as a necessary incident to the clearing of the decks of the wounded and dead cattle, and that they were, therefore, lost by a peril of the sea.

(3) If the sixty-three cattle, for the value of which decree has been rendered against the respondent, were sound and were driven or designedly suffered to go overboard by the master without cause, they were unjustifiably jettisoned, and the shipowner is relieved from responsibility therefor by the terms of the bill of lading, which provided that the cattle were shipped on deck at owner's risk, according to the construction placed upon that clause by the Courts of Great Britain.

(4) If the sixty-three cattle, for the value of which decree has been rendered against the respondent, were sound and were driven or designedly suffered to go overboard by the master without cause, the loss or damage was occasioned by causes beyond the control of the shipowner, he having properly fitted, manned and equipped his vessel and confided the same to the care of a qualified master.

(5) If the sixty-three cattle, for the value of which decree has been rendered against the respondent, were sound and were driven or designedly suffered to go overboard by the master without cause, and were drowned, the loss was occasioned by a peril of the sea or accident of navigation occasioned by the negligence, default or error in judgment of the master, and under the provisions of the bill of lading and the British law applicable thereto, the shipowner is freed from responsibility.

(6) That although the District Court specifically held that the stipulation that the contract should be governed by British law was invalid and void, the Circuit Court of Appeals omitted to pass upon that point, and that the point is one of great public interest.

Wherefore, your petitioner prays that this Honorable Court will be pleased to grant a writ of *certiorari* in this cause to the United States Circuit Court of Appeals for the Second Judicial Circuit, to bring this case before this Honorable Court and for such other relief as to this Honorable Court may seem just.

Compania de Navigacion la Flecha
H. Maitland Kersey
Agent.

SOUTHERN DISTRICT OF NEW YORK, ss. :

H. MAITLAND KERSEY, being duly sworn, says that he is agent in New York of the Compania de Navigacion la Flecha, owner of the steamer "Hugo," and is authorized to make this verification on its behalf. That he has read the foregoing petition and knows the contents thereof, and that the allegations contained therein are true according to deponent's information and belief. The sources of deponent's knowledge and the grounds of his belief are found in the proceedings, and in the Record of the cause in the District Court and in the United States Circuit Court of Appeals.

Deponent further says that the Compania de Navigacion la Flecha is a foreign corporation and none of its officers reside within the United States, but on the contrary reside abroad, where they now are, as deponent believes.

H. MAITLAND KERSEY.

Sworn to before me, this 26th day of March, 1895.

CHARLES C. NOTT, JR.,
Notary Public,
N. Y. Co.

[L. S.]

I hereby certify that I have examined the foregoing petition and that in my opinion the petition is well founded and that the same is one in which the prayer of the petitioner should be granted.

WILHELMUS MYNDERSE.